

App. 1

APPENDIX A

FILED: January 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2062
(2:18-cv-00004-JPB-MJA)

TOM DOMINGO, SR.

Plaintiff - Appellant

v.

DEPARTMENT OF THE ARMY,
SAMR-EO-CCR Spurgeon A. Moore;
US EEOC, Office of Federal Operations

Defendants - Appellees

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

App. 2

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-2062

TOM DOMINGO, SR.,
Plaintiff - Appellant,
v.

DEPARTMENT OF THE ARMY,
SAMR-EO-CCR Spurgeon A. Moore;
US EEOC, Office of Federal Operations,
Defendant - Appellees.

Appeal from the United States District Court for the
Northern District of West Virginia, at Elkins. John
Preston Bailey, District Judge. (2:18-cv-00004-JPB-
MJA)

Submitted: January 17, 2019 Decided: January 22, 2019

Before WILKINSON and DUNCAN, Circuit Judges,
and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Tom Domingo, Sr., Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Tom Domingo, Sr., appeals from the district court's order dismissing for lack of jurisdiction his civil action challenging an employment decision under the Veterans' Preference Act and Veterans Employment Opportunity Act and referencing an employment discrimination claim filed with the Equal Employment Opportunity Commission. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Domingo v. Dep't of the Army*, No. 2:18-cv-00004-JPB-MJA (N.D.W. Va. Aug. 28, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

App. 4

APPENDIX B

FILED: March 18, 2019

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-2062
(2:18-cv-00004-JPB-MJA)

TOM DOMINGO, SR.

Plaintiff - Appellant

v.

DEPARTMENT OF THE ARMY,
SAMR-EO-CCR Spurgeon A. Moore;
US EEOC, Office of Federal Operations

Defendants - Appellees

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Duncan, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA
Elkins**

TOM DOMINGO, SR.,

Plaintiff,

v.

**DEPARTMENT OF
THE ARMY and
US EEOC,**

Defendants.

Civil Action No. 2:18-CV-4

Judge Bailey

ORDER DISMISSING CASE

(Filed Aug. 28, 2018)

Pending before this Court is defendants' Motion to Dismiss for Lack of Proper Service and Lack of Subject Matter Jurisdiction, filed August 14, 2018 [Doc. 32]. A **Roseboro** notice was issued on August 16, 2018. The plaintiff filed his response on August 21, 2018, and the defendants filed their reply on August 23, 2018.

On January 16, 2018, the plaintiff filed a *pro se* complaint against the Department of the Army and the EEOC, alleging that he had "applied for a federal job at Fort Belvoir, Virginia, under veteran's preference and a[n] Iraq veteran was selected." The plaintiff alleges that the person hired was not eligible for a veteran's preference, but that he was entitled to the preference.

App. 6

The defendants have moved to dismiss on two bases. First, that the plaintiff has not properly served either defendant. Second, that this Court lacks subject matter jurisdiction over this claim. This Court will address the second argument first.

The Department of the Army contends that the plaintiff made the same arguments as are embodied in his complaint to the Merit Systems Protection Board, which denied his claim on February 10, 2014, and informed him that he could seek review of the decision by filing a request with the United States Court of Appeals for the Federal Circuit no later than sixty calendar days after the date of the decision [Doc. 37-1].

In his response, the plaintiff indicates that he also filed a claim with the EEOC and received a right to sue letter on October 27, 2017. The plaintiff has not filed any supporting documentation with the Court.

Subject matter jurisdiction is a threshold inquiry to determine whether a court can hear a case. Fed. R. Civ. P. 12(b)(1); ***Morrison v. Nat'l Austl. Bank Ltd.***, 561 US. 247, 254 (2010) (citations omitted). A court must determine whether it has subject matter jurisdiction before addressing the substance of a lawsuit. ***Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S.E.P.A.***, 313 F.3d 852, 857 (4th Cir. 2002) (citing ***Owens-Illinois, Inc. v. Meade***, 186 F.3d 435, 442 n. 4 (4th Cir. 1999)). Without jurisdiction, “the court cannot proceed.” ***Steel Co. v. Citizens for a Better Env’t***, 523 U.S. 83, 94 (1998) (citations omitted).

App. 7

A prospective plaintiff must demonstrate that a court has subject matter jurisdiction to address his claims. ***Richmond, Fredericksburg & Potomac R. Co. v. United States***, 945 F.2d 765, 768 (4th Cir. 1991) (citing ***Adams v. Bain***, 697 F.2d 1213, 1219 (4th Cir. 1982)).

The Veterans' Preference Act established the concept of veterans' preference, which gives eligible veterans certain advantages when seeking federal employment. ***Miller v. FDIC***, 818 F.3d 1357, 1359 (Fed. Cir. 2016).

The Veterans Employment Opportunity Act allows eligible veterans to administratively challenge a federal agency hiring decision that allegedly misapplied veterans' preferences. *See* 5 U.S.C. § 3330a. A purportedly aggrieved individual must first file a complaint to the United States Department of Labor. ***Id.*** The individual can then appeal to the MSPB. ***Id.*** The individual can appeal a final MSPB order to the United States Court of Appeals for the Federal Circuit. *See* 5 U.S.C. § 7703. Alternatively, the individual can seek redress in the applicable United States district court **only** if he files a timely notice of election to the MSPB before the MSPB issues a judicially reviewable decision. *See* 5 U.S.C. § 3330b.

The MSPB already issued a final order regarding the exact same allegations that Domingo presents in this lawsuit. [Doc. 37-1]. The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review appeals from a final order of the MSPB. ***Elgin v. Dep't of Treasury***, 567 U.S. 1, 6 (2012); 28

App. 8

U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(b)(1) (with limited exceptions, judicial review of a final MSPB order shall be in the Federal Circuit).

Accordingly, this Court lacks subject matter jurisdiction to address Domingo's allegations in this lawsuit, requiring that this action be dismissed. Defendants' Motion to Dismiss for Lack of Proper Service and Lack of Subject Matter Jurisdiction, filed August 14, 2018 [Doc. 32] is **GRANTED** and this action is hereby **DISMISSED WITH PREJUDICE**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record and to mail a copy to the *pro se* plaintiff.

DATED: August 28, 2018.

/s/ John Preston Bailey
JOHN PRESTON BAILEY
UNITED STATES
DISTRICT JUDGE

App. 9

APPENDIX D

Tom Domingo <domingotom@gmail.com>
to OFOEEOC Jan 16, 2018, 11:39 AM
Officer of the day

I filed my complaint in US District Court and I need your fax number to send you a copy of the complaint to show you have been served also could you send me the fax number for the department of the army or do you send it to them when I serve you? Thank you Tom Domingo

OFOEEOC <OFO.EEOC@eeoc.gov>
Jan 16, 2018, 11:58 AM

to me

Mr. Domingo,

You do not need to serve the Commission with your civil action against the Army. For the Army, you could contact the EEO Director at (703)545-5762 to obtain the correct information for providing service.

Attorney of the Day
Office of Federal Operations

APPENDIX E

[SEAL] **U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013
[FAX# 202-663-7022]**

Thomas Domingo, a/k/a
Tyrone D.,¹
Complainant,

v.

Ryan D. McCarthy,
Acting Secretary,
Department of the Army,
Agency.

Request No. 0520170515

Appeal No. 0120160198

Hearing No. 570-2014-00585X

Agency No. ARMYER12SEP04017

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. CP 20160198 (July 20, 2017). EEOC Regulations

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

App. 11

provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. See 29 C.F.R. § 1614.405(c).

The record indicates that Complainant filed his complaint on January 14, 2013, alleging discrimination based on national origin, disability, and age when he was not hired for the position of Airfield Management Specialist under two vacancy announcement numbers. An Equal Employment Opportunity Commission Administrative Judge issued a decision without a hearing finding no discrimination. On October 13, 2015, the Agency issued its final order finding no discrimination regarding the complaint. Complainant appealed and the Commission affirmed the Agency's final order.

In his request, Complainant reiterates arguments he previously made. The Commission emphasizes that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the

App. 12

policies, practices, or operations of the Agency. Complainant has not done so here.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 0120160198 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

App. 13

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

/s/ Carlton M. Hadden
Carlton M. Hadden, Director
Office of Federal Operations

October 27, 2017 [Jan. 17, 2018 90 days.]
Date

App. 14

APPENDIX F

8/27/2018 Vet Guide for HR Professionals

The Vietnam conflict in the 1960s resulted in several modifications of the VP law of 1944. In 1966, legislation was passed which granted peace-time preference for Vietnam-era vets who served on active duty for more than 180 consecutive days between January 31 1955 and Oct 10, 1976; National guard and reserve service was excluded from this legislation.

In 1967 legislation was passed which expanded preference to all veterans who served on active duty for more than 180 days (no requirement to serve during war, campaign, or conflict) between January 31, 1955 and October 10, 1976. As with the previous year's law, National guard and reserve service was not included in this expansion.

The end of the Vietnam conflict brought with it yet another law, passed in 1976. This law put added restrictions on veterans whose service begins after October 14, 1976. For post-Vietnam era veterans, preference was granted only if these veterans became disabled, or served in a declared war, a campaign, or expedition. This legislation was the result of the conclusion of the Vietnam conflict and its draft, the Department of Defenses' desire to build a career military service, and veterans organizations' concern that preference was not appropriate for purely peacetime service.

The Civil Service reform act of 1978 created new benefits for veterans with a 30 percent or more disability.

App. 15

It also gave veterans extra protection in hiring and retention. Under this act, preference was no longer granted to nondisabled veterans who retired at the rank of major or above.

In 1988, a law was passed that required the Department of Labor to report agencies' violations of Veterans preference and failure to list vacancies with State employment services to the Office of Personnel Management for enforcement.

The last major legislation affecting Veterans preference occurred in the form of the Defense Appropriations act of 1997. Under this legislation, preference was accorded to anyone who served on active duty during the Gulf War period (August 2, 1990 through January 2, 1992). This law also granted preference to certain service members who earned campaign medals for service in Bosnia and Herzegovina in support of Operation Joint Endeavor (November 20, 1995 through December 20, 1996) or Operation Joint Guard (December 20, 1996 through a date designated by the Secretary of Defense).

Time line of Veterans Preference in the Federal Civil Service

1865

First Veterans preference (VP) in appointment law; for Union veterans separated for wounds or illnesses. Vets must have been honorably discharged and qualified for job.

App. 16

1876

First VP in reduction in force (RIF) law

1919

After World War I, law grants VP to all honorably discharged veterans, their widows, and the spouses of veterans too disabled to work

1923

To distinguish between the preference and granted by the 1865 and 1919 laws, an Executive Order grants disabled vets 10 points and other vets 5 points, to be added to their individual numerical ratings in examinations (point system first introduced)

1929

Executive Order places disabled vets at the top of examination lists of eligibles and continues 10 extra points

1944

Veterans Preference Act incorporates 1865, 1876, and 1919 laws, plus Executive Orders for extra points, passover protection, and rule of three. Continues to be cornerstone of Veterans civil service legislation today (applied preference to active duty service during war, expedition, or campaign for which badge was authorized, must be separated under honorable conditions, rule of three)

1952

Amendment extended 1944 law to include active duty service from 4/28/52 - 7/1/55 Korean War

App. 17

1966

Peacetime preference for Vietnam-era vets added active duty for >180 consecutive days between Jan 31, 1955 and Oct 10, 1976; guard and reserve service not included

1967

Expanded 1967 act to all vets who served on active duty for >180 days (no requirement to serve during war, campaign, or conflict) between Jan 31, 1955 and Oct 10, 1976 (guard and reserve service not included)

1968

Executive Order creates Veterans Transitional Appointment, a new way for Vietnam-era veterans to enter Federal service without public examination. Forerunner of Veterans Readjustment Appointment (VRA)

1974

VRA enacted into law

1976

By law, veterans whose service begins after October 14, 1976 are granted preference only if they become disabled, or serve in a declared war, a campaign, or expedition. (This resulted from the end of the Vietnam conflict and draft, Department of Defense's desire to build a career military service, and Veterans groups concern that preference was not appropriate for purely peacetime service.)

App. 18

1978

Civil Service reform act creates new benefits for 30 percent or more disabled veterans; special appointing authority, and extra protection in hiring and retention. Preference ends for nondisabled retired majors and above. Efforts to broaden rule of three and make exceptions to numerical ratings in examinations defeated by Veterans groups

1988

Law requires Dept. of Labor to report agencies' violations of Veterans preference and failure to list vacancies with State employment services to OPM for enforcement

1990

VRA law amended to include post-Vietnam-era veterans, but end coverage of most Vietnam-era veterans

1992

VRA law revised to restore eligibility to Vietnam-era veterans

1997

Defense Appropriations Act grants preference to gulf war veterans and certain campaign medal holders in Bosnia (included guard or reserve service if for other than training)

2006

National Defense Authorization Act, Public Law 109-163, granted preference to those serving on active duty in the armed forces for a period of more

App. 19

than 180 consecutive days any part of which occurred during the period beginning September 11, 2001 and ending on a date prescribed by Presidential proclamation or by law as the last day of Operation Iraqi Freedom. The law also amended 5 U.S.C. 2108(1) clarifying that individuals discharged or released from active duty in the armed forces, as opposed to being separated, may receive veterans' preference provided they meet other applicable veterans' preference eligibility requirements.

* * *
